BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD L. MYERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,987
CASE & ASSOCIATES PROPERTIES	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes issued March 8, 2006. The Administrative Law Judge (ALJ) awarded claimant temporary total disability benefits and medical treatment, with George G. Fluter, M.D., as the authorized treating physician, after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent.

ISSUES

Respondent raises the following issues in its Request For Board Review, filed March 14, 2006:

1. Did the injury alleged by claimant arise out of and in the course of his employment?

2. Did the ALJ exceed her authority and/or jurisdiction in granting benefits?

Additionally, the Board raises the following issue for consideration:

3. Was respondent's appeal out of time due to respondent's counsel's failure to file a properly signed "Request For Board Review" in violation of K.S.A. 44-536a(a)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

The Board will first consider whether this matter should be dismissed or whether respondent's appeal should be allowed to continue. The ALJ issued her Order on March 8, 2006, with respondent filing what appeared to be a timely appeal on March 14, 2006. However, upon review, the Board noted the signature on respondent's Request For Board Review was signed with the attorney of record's signature but with the initials "sr" directly below that signature. Upon further inquiry, the Board was advised the signature was that of respondent's attorney's legal assistant. K.S.A. 44-536a(a) states in part:

> Every pleading, motion and other paper provided for by the workers compensation act of any party, who is represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name, and the attorney's address and telephone number shall be stated.[1]

Counsel for both claimant and respondent were contacted by the Board's letter dated May 9, 2006, and given 15 days to address whether the appeal should be dismissed due to the inappropriate signature. Respondent's counsel responded by letter of May 10, 2006, and attached a revised copy of respondent's Request For Board Review, properly signed by the attorney of record.

K.S.A. 44-536a(c) further states:

> If any pleading, motion or other paper provided for by the workers compensation act is not signed, such pleading, motion or other paper shall not be accepted and shall be void unless it is signed promptly after the omission is called to the attention of the pleader or movant.[2]

The Board finds respondent's prompt action in rectifying the signature omission complies with the language of K.S.A. 44-536a(c). However, counsel for respondent is cautioned that attorneys are responsible for the training and supervision of their legal assistants. The signing of a legal document by a non-lawyer comes perilously close to the unauthorized practice of law.

Turning now to the merits of this appeal, claimant, a 20-year employee of respondent, had no medical history of significant health problems before December 21,

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[1] K.S.A. 44-536a(a).

[2] K.S.A. 44-536a(c).

2005. On that day, while helping repair a water main pipe, claimant suffered a stroke (hemorrhagic infarct due to cerebral aneurysm) when his left anterior communicating artery ruptured. This stroke left claimant with headaches, left arm pain and numbness and speech difficulties.

The dispute in this matter centers around whether claimant's stroke was the result of his work activities such that respondent would be responsible for claimant's resulting difficulties.

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[5]

K.S.A. 2005 Supp. 44-501(e) states:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more that the employee's usual work in the course of the employee's regular employment.[6]

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[3] K.S.A. 2005 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[6] K.S.A. 2005 Supp. 44-501(e).

The Kansas Supreme Court, in *Makalous*,[7] addressed the language contained in K.S.A. 1972 Supp. 44-501 dealing with the "usual vs. unusual" exertion dispute contained in the so-called "heart amendment" to K.S.A. 1972 Supp. 44-501, stating:

> What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.
>
> Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court.[8]

In this case, the ALJ determined claimant had suffered injury arising out of and in the course of his employment with respondent. Although it is not stated in the Order, the ALJ apparently determined that claimant had exceeded his usual activities and thus suffered the stroke.

Claimant alleges he exceeded his normal work activities while repairing the broken water main. It is clear from this record that claimant, as head maintenance foreman for respondent, was involved in daily physical activities. These activities included painting, repairing and installing appliances, basic plumbing, moving manhole covers, small landscaping jobs and general maintenance of respondent's apartment complex. However, the job in question on the date of accident was an unusual job. It involved digging a hole in order to repair a main water line leading into one of the apartment buildings. This necessitated use of a backhoe and several hours of physical labor, including shoveling, moving support boards and lights and cutting the pipe with a "sawzall". Claimant testified he was the only one in the hole handling the shovel, and he was in and out of the hole on more than one occasion.

While claimant had participated in the repair of other water lines, this was the largest and required extra time and effort. This repair took between 4½ and 5½ hours, leading up to claimant's stroke.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[9]

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[7] *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

[8] *Makalous* at 481.

[9] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The Board finds that claimant's work activities on the date of accident were unusual in both the duration of the physical labor and the effort required to repair this large water line rupture. In following the logic of *Makalous*, the Board finds claimant did suffer accidental injury arising out of and in the course of his employment with respondent.

Respondent further contends that the ALJ exceeded her jurisdiction in allowing the medical reports of Dr. Fluter and in awarding claimant temporary total disability benefits and medical benefits before the filing of the application for hearing.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[10]

Respondent's objection to the award of benefits and the inclusion of Dr. Fluter's medical report are not issues over which the Board takes jurisdiction from a preliminary hearing appeal. Respondent's appeal on those issues is dismissed.

The Board, therefore, affirms the award of benefits in this instance.

As is always the case, these findings are not binding upon a full hearing on the claim but shall be subject to a full presentation of the facts.[11]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 8, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[10] K.S.A. 44-534a(a)(2).

[11] K.S.A. 44-534a(a)(2).

Dated this ____ day of June, 2006.

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director